

**SOAH DOCKET NO. 582-12-0707
TCEQ DOCKET NO. 2011-1566-UCR**

APPLICATION FROM AQUA UTILITIES, INC. DBA AQUA TEXAS, INC., CCN NOS. 11157 AND 20453, TO TRANSFER AND CANCEL CCNS 13114 AND 21005 FROM TEXAS-AMERICAN WATER COMPANY IN BRAZORIA, HARRIS, LIBERTY, MATAGORDA, AND MONTGOMERY COUNTIES	§ § § § § § § § §	BEFORE THE STATE OFFICE OF ADMINISTRATIVE HEARINGS
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CUSTOMERS' REPLIES TO EXCEPTIONS

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY:

NOW COME Jesse Parker, Richard T. Hyde, and Rafael Alcala ("Customers") who file these Replies to Exceptions and in support thereof would show as follows:

I. INTRODUCTION

Aqua Texas' Exceptions gives the June 15th letter from Tammy Benter the status of a final order. According to Aqua the letter constituted a waiver of the Executive Director's right to request a hearing. This contention is without merit. At the time the letter was written the City of Houston, the City of Woodbranch Village, the City of Hillcrest Village, and the City of Stagecoach had not been notified as required by Commission rule. The Commission may not issue a final order in an STM proceeding without proper notice having been given. Thus, to treat the June 15th letter like a final order is totally in error.

Correctly, Aqua Texas recognizes that the Commission must set forth a conclusion of law stating that the transaction is in the public interest. The conclusion of law needs to recite the nine statutory public interest criteria set forth in Section 13.246(c). However, Aqua fails to acknowledge that the conclusion must be supported by underlying findings of fact-----of which, there are none attached to the Proposed Order. There are no underlying findings because there has not been an evidentiary hearing which supports the entry of such findings. Thus, the Commission must remand this case to SOAH so that a hearing can be commenced to determine if this transaction is in the public interest.

II. AQUA TEXAS IS WRONG, THE EXECUTIVE DIRECTOR HAD AUTHORITY TO REFER APPLICATION TO SOAH FOR A HEARING

Even though Aqua Texas did not provide notice to the City of Houston, the City of Woodbranch Village, the City of Hillcrest Village, and the City of Stagecoach, as required by TCEQ Rule 291.112(c)(3), it argues that Conclusion of Law No. 9 should be amended to indicate that the Executive Director waived its right to a hearing at SOAH such that the Commission no longer has “authority to refer the applications for a contested case hearing at SOAH”.¹ Aqua Texas is treating the letter of June 15, 2011 from Ms. Benter as though it is a final order² of the agency. The Legislature³ and Commission rules⁴ have made it clear that public notice must be provided before an application for a sale, transfer, or merger (“STM”) can be approved administratively by the Executive Director. A letter of approval issued prior to the issuance of public notice is void.⁵ It is also clear that the 120 day review period does not begin to run until public notice has been completed.⁶

Before the Administrative Law Judge, Aqua Texas argued that Customers did not have standing to raise the failure to provide notice.⁷ There is no question that Jesse Parker, Richard Hyde, and Rafael Alcala are ratepayers located in the service territory of Texas American Water Company⁸, the utility whose service territory that Aqua Texas is seeking to transfer or acquire. As such each ratepayer is an “affected person” under TCEQ Rule 291.3(3).⁹ In that capacity each ratepayer has standing to participate in this proceeding. All parties to a proceeding have the right to weigh in on jurisdictional issues or any other issue that is relevant to the proceeding. The customer-protestants are not second class parties.

Before the Administrative Law Judge, Aqua Texas complained that the customer-protestants had not filed comments before the Executive Director within the 30 day comment

¹ Aqua Texas’ Exceptions to the PFD at 3.

² According to Aqua Texas, after the issuance of the June 15, 2011 letter, the Commission can only undertake ministerial functions with regard to the application, so that the letter acts as if it is final order. See Aqua Texas’ Exceptions to PFD at 3.

³ Texas Water Code §§13.301(a) and (h).

⁴ 30 Tex. Admin. Code §§ 291.109(h), 291.112(c)(3) and 50.133(a)(1).

⁵ Texas Water Code §13.301(h).

⁶ 30 Tex. Reg. 8973 (Dec. 30, 2005).

⁷ Aqua Texas’ Plea to the Jurisdiction, Motion for Final Summary Disposition, Motion to Dismiss/Remand, and Brief in Support at 20.

⁸ Id at 20, fn 49.

⁹ 30 Tex. Admin. Code §291.3(3).

period. However, the 30 day comment period had not begun to run because notice has not been completed. Even if it had, a failure to comment would not relegate customer-protestants to the status of second class parties where they lose the right to weigh in with regard to jurisdictional issues before SOAH and the Commission.

III. THERE ARE NO UNDERLYING FINDINGS OF FACT TO SUPPORT PROPOSED CONCLUSION OF LAW NO. 10 WITH REGARD TO PUBLIC INTEREST CRITERIA

Aqua Texas in its Exceptions has asked that the Commission adopt a new conclusion of law (Conclusion of Law No. 10).¹⁰ The first part of the conclusion of law states that “the criteria set forth in Texas Water Code Sections **13.246(c)**, 13.254, and 13.301 have been considered”. (Emphasis added). Aqua Texas is correct that an ultimate finding of fact or conclusion of law¹¹, indicating that the transaction is in the public interest, must be adopted by the Commission before an STM application can be approved.¹² This is especially the case when there has been a failure to provide public notice. Subsection 13.301(g) makes this abundantly clear.

Section 13.301(g): If a hearing is requested **or if the utility** or water supply corporation **fails** to make the application as required **or to provide public notice, the sale, acquisition, lease, or rental may not be completed unless the commission determines if that the proposed transaction serves the public interest.** (Emphasis added).

However, there must be underlying findings which support the conclusion of law.¹³ In this instance, there are no underlying findings of fact supporting the conclusion of law indicating that the transaction is in the public interest. The underlying findings must satisfy the nine criteria set out in Subsection 13.246(c).¹⁴

Recently the Commission approved an application to transfer service territory under Section 13.301.¹⁵ The Commission properly set forth all of the statutory criteria under Section 13.246(c) as a conclusion of law in its *East Cedar Creek* decision.¹⁶ Most importantly, the

¹⁰ Aqua Texas' Exceptions to the PFD AT 3-4.

¹¹ An ultimate finding of fact is a conclusion of law. *Pedernales Elec. Co-op., v. Public Util. Comm'n*, 809 S.W.2d 332, 339 (Tex.App.-Austin 1991, no writ).

¹² Texas Water Code §13.301(d).

¹³ *Texas Health Facilities Comm'n v. Charter Med.-Dallas, Inc.*, 665 S.W.2d 446, 449-53 (Tex.1984).

¹⁴ TCEQ Rule 291.112(b) and TCEQ Rule 291.112(c)(5)(B). 30 Tex. Admin. Code §291.112(b) and (c)(5)(B).

¹⁵ *Application of East Cedar Creek Fresh Water Supply District*, TCEQ Docket No. 2009-1865-UCR; SOAH Docket No. 582-10-1868, Final Order (March 10, 2011), hereinafter referred to as *East Cedar Creek*.

¹⁶ *East Cedar Creek* at 9-10, COL No. 7.

Commission set forth all the underlying facts to support the statutory public interest criteria.¹⁷ The Commission adopted 31 underlying findings of fact to support the public interest conclusion of law. In the case at bar, there are no underlying findings to support an ultimate finding or conclusion of law that the transaction is in the public interest.


This case must be sent back to SOAH so that the underlying and ultimate findings can be determined pursuant to the TCEQ Rule 291.112(b) and (c)(5)(B). The Commission may not enter an order in this proceeding without such findings.

IV. PRAYER

Customers (Jesse Parker, Richard T. Hyde, and Rafael Alcala) pray that this proceeding be remanded to SOAH so that an evidentiary hearing may be conducted on whether the STM applications are in the public interest, and if not, what conditions¹⁸ ought to be imposed upon the transactions so that they satisfy the public interest criteria mandated by Subsection 13.246(c) of the Texas Water Code.

Respectfully submitted,

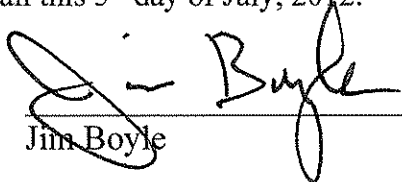
HERRERA & BOYLE, PLLC
816 Congress Avenue, Suite 1250
Austin, Texas 78701
(512) 474-1492 (voice)
(512) 474-2507 (fax)


JIM BOYLE
State Bar No. 02795000

ATTORNEY FOR CUSTOMERS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon all parties of record by fax and/or first class mail this 5th day of July, 2012.


Jim Boyle

¹⁷ East Cedar Creek at 3-8, FOF Nos. 10-41.

¹⁸ 30 Tex. Admin. Code §291.112(b).